

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35087

**CANADIAN NATIONAL RAILWAY COMPANY AND
GRAND TRUNK CORPORATION**

-CONTROL-

EJ&E WEST COMPANY

**WILL COUNTY'S RESPONSE TO CN'S PETITION
FOR RECONSIDERATION OF CASE SCHEDULING ORDER**

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September 3, 2008

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The Applicants in this proceeding, the Canadian National Railway Company and the Grand Trunk Corporation (collectively "CN"), have filed a document entitled Applicants' Petition to Modify The Procedural Schedule To Provide For A Prompt Final Decision On The Merits Under 49 U.S.C. §11324(d)(1) Subject To A Condition Preserving The Status Quo Pending Environmental Review. Will County, Illinois ("Will County") submits this response to the CN's Petition.

What CN's Petition basically asks the Board to do is to issue a decision on the transportation merits of the application pursuant to 49 U.S.C. §11324(d)(1) prior to completion of the Board's Environmental Impact Statement ("EIS"), and to include in the decision a directive that CN shall not disturb the environmental status quo pending issuance of the EIS. In Decision No. 2 issued in this docket and bearing an effective date of November 29, 2007, the Board established a procedural schedule to govern this docket. On page 2 of that decision, the Board stated:

Under 49 U.S.C. 11325(d)(2), a final decision would be issued by April 25, 2008; however, the Board is also required to accommodate in its decisionmaking the

requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321 *et seq.* Thus, the Board will not issue a final decision on the merits of the application until the environmental review is completed, including preparation of an EIS and a substantial opportunity for public comment and participation.

The Procedural Schedule attached as Appendix A to the Board's November 29, 2007 Order reflects the Board's decision not to issue a final decision on the merits until the EIS and environmental review is completed.

The CN's petition in essence asks the Board to reconsider that decision. For the reasons set forth below, the CN's petition for reconsideration should be denied.

STATEMENT OF FACTS

The environmental consequences of the CN's proposed acquisition of the operating assets of the Elgin, Joliet and Eastern Railway Company ("EJ&E") are very significant. In the Board's November 29, 2007 decision, the Board concluded that an EIS was required "in view of the large projected traffic increases on certain line segments, and the potential impacts of the proposed transaction on a number of communities that would likely result from the increased activity levels on rail line segments and at rail facilities." Decision No. 2 at 15 (served Nov. 26, 2007). Nothing has changed from that original analysis.

The EJ&E lines run from the Wisconsin border through densely populated communities in Illinois in Lake County, northwest Cook County, DuPage County, Will County, and southern Cook County, and then into densely populated areas in Indiana. In Will County, the EJ&E effectively bisects Will County. There are 52 public at grade crossings in Will County involving the EJ&E, with 38 of those on the mainline. See Opening Memorandum of Will County (WILL-5) at 2-3 and Ex. 2 thereto at ¶7. Rail traffic in Will County from the East Joliet Yard northward is projected to grow from 18 to 45 trains daily, and rail traffic from the East Joliet Yard south to the county border is projected to grow from 6 to 28 trains daily. *Id.* at 3 and Ex. 1 thereto at ¶7.

The increase in hazardous materials carried on those lines is projected to grow by approximately 700 percent. Railroad Control Application (CN-2) at 247, Attachment A-2. Will County has a population in excess of 700,000 people. Opening Memorandum of Will County (WILL-5) at 2 and Ex. 1 thereto at ¶5. Other counties and communities are expected to experience similar rail traffic increases.

The potential regional impact of the proposed acquisition of the EJ&E lines by the CN is enormous. That is why the STB received over 3600 comments on the draft EIS Scope of Study and why the STB significantly increased the scope of the EIS in response to those comments. See Decision at 2 (served April 28, 2008).

ARGUMENT

CN'S Motion for Reconsideration Should Be Denied

The facts and arguments demonstrating why the CN's Petition should be denied are set forth eloquently and forcefully in the Village of Frankfort's Opposition to Applicant's Petition to Modify Procedural Schedule (FRKF-6) and in the Village of Barrington's Reply to Applicant's Petition to Modify the Procedural Schedule (BARR-5). In summary form, Will County agrees with the arguments by Frankfort and Barrington that the CN's Petition should be denied for the following reasons:

- CN's Petition is effectively a petition to reconsider the procedural schedule established in the Board's Decision No. 2 in this docket effective November 29, 2007. Under the Board's rules, it is CN's burden to establish that the Board's prior order requires revision due to material error, new evidence or substantially changed circumstances, and the petition must include a request that the Board make such a determination. See 49 C.F.R., § 1115.4. The CN's Petition does not satisfy any of those threshold requirements.
- Section 1502 of the Council on Environmental Quality ("CEQ") regulations implementing NFPA, which the CEQ has characterized as the "heart of the environmental impact statement", require the STB to analyze the no action alternative and other reasonable alternatives as part of the environmental impact statement. 40 C.F.R. § 1502.14, 1502.14(a) and (d).

The CEQ regulations also specifically prohibit action by the STB that would “[l]imit the choice of reasonable alternatives.” 40 C.F.R., § 1506, (1)(2). Since the STB can and has in the past determined that no action is the preferred alternative given the environmental consequences of a proposed transaction, the CN’s petition must be denied because prematurely approving the proposed acquisition effectively precludes selection of the no action alternative. *See Construction and Operation-Indiana & O. Ry. Co.*, 9 I.C.C.2D 783 (1993) (no action is the preferred alternative). *Cf. Alaska R. Corp.-Const. & Oper. Exempt-Rail Line Between Eilson Air Force Base (North Pole) and Fort Greely (Delta Junction)*, STB Finance Docket No. 34658 (served Oct. 4, 2007) (conditional grant of construction exemption authority is not favored because environmental review could result in denial of the construction proposal notwithstanding prior preliminary approval).

- Section 9.1 of the CN’s Stock Purchase Agreement (“SPA”), which appears to contemplate an extension of the closing date if the Board’s environmental review is not completed by the anticipated closing date of December 31, 2008, suggests that the extraordinary relief requested by CN is unnecessary.
- If the ambiguity created by Section 9.1 of SPA is ignored, it would appear that the extraordinary relief requested by CN still will not allow CN to force the seller to close the transaction in light of the language in Section 7.4 of the SPA.

In addition to the facts and arguments made by Frankfort and Barrington in which Will County joins, there are several additional considerations that merit denial of CN’s Petition. First, while the text of CN’s Petition suggests that the Board’s prior precedent supports its proposal for a bifurcated decision making process, CN candidly admits in footnote 10 on page 13 of its petition that the prior Board decisions are really significantly different than what the CN is asking the Board to do here:

CN’s proposal differs significantly from the Board’s past use of bifurcated decisions in rail construction cases, in which the Board has reserved its final decision on the merits of a proposal, pending completion of the environmental analysis. Here, for the reasons discussed above, the Board’s October Merits Decision under ICCTA would be final and effective, and would permit consummation of the control transaction.

Put simply, there is no Board precedent, nor to the best of Will County's knowledge is there precedent from any other similarly situated administrative agency, to support the bifurcated decision making process advocated by the CN.

Additional grounds not to grant the CN's Petition relates to the practical consequences arising if the CN's Petition was granted. The prohibited actions that would effect the "environmental status quo" that the CN may not undertake until the EIS is issued are ill-defined and unknown. The CN has said that it will not re-route traffic from Chicago over EJ&E lines that could cause adverse environmental impacts, but it reserved the right to serve existing or new traffic or traffic from other carriers that it is "legally required to interchange." CN Petition at 2, n.2. The CN's Petition is silent as to the other activities that it intends to undertake if its Petition is granted. There is no bright line distinguishing permissible and impermissible conduct, nor is there any monitoring capability. Instead, all we have is a promise by the CN that it will ask the STB for guidance if it has a question as to whether an action it intends to undertake is permissible. CN Petition at 2, n.2.

Moreover, if the Board grants the Petition and enters an order approving the transportation merits of the acquisition, the transaction closes, and the Board then selects the no action alternative, there would be a real quagmire created. At that point, there would be a rail carrier who now owned rail assets that the Board had determined that it cannot use. Identifying the exact limits on the CN's right to use rail assets that it would then own would be difficult, to say the least.

CONCLUSION

There are many good and substantial reasons why this Board and similarly situated administrative agencies do not make final decisions concerning proposed actions until the environmental consequences of the proposed actions have fully and finally analyzed. The CN's

Petition is unprecedented; granting it would violate the CEQ regulations governing the preparation of environmental impact statements; it fails to meet the applicable standards of the Board's rules; and it is fraught with practical problems. It should be summarily rejected.

Respectfully submitted,
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Dated: September 3, 2008

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he has caused a true and correct copy of the foregoing document(s) to be served upon:

SECRETARY OF THE SURFACE TRANSPORTATION BOARD

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E. Street, SW
Washington, D.C. 20423-0001

ALL PARTIES OF RECORD AS OF THIS DATE

SEE ATTACHED SERVICE LIST

via U.S. mail from the law office of Hinshaw & Culbertson LLP, 400 South Ninth Street, Suite 200, Springfield, Illinois, 62701, to the persons named on the Surface Transportation Board's service list as of this date, September 3, 2008.



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